

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

DENNIS SIMMONS,)	
)	
Petitioner,)	
v.)	Civil Action
)	No. 05-3102-CV-S-RED-H
ROBERT McFADDEN, et al.,)	
)	
Respondents.)	

ORDER AND JUDGMENT

Pursuant to the governing law and in accordance with Local Rule 72.1 of the United States District Court for the Western District of Missouri, the petition herein for a writ of habeas corpus was referred to the United States Magistrate for preliminary review under the provisions of 28 U.S.C. § 636(b).

The United States Magistrate has completed his preliminary review of the petition herein for a writ of habeas corpus and has submitted to the undersigned a report and recommendation that the petition for a writ of habeas corpus be dismissed without prejudice.

Petitioner has filed exceptions to the report and recommendation of the Magistrate in which he contends that he is actually challenging his current confinement and as such, his claim is properly before this Court. It is petitioner's contention that he is challenging "the sentencing court's use of facts not admitted by him nor found beyond a reasonable doubt by a jury to enhance his sentence." [Exceptions to Report and Recommendation, 2].

Having fully reviewed the record de novo, the Court agrees with the Magistrate that the petition should be dismissed on the grounds that it is not properly before this Court. Regardless of petitioner's assertions, he has failed to establish at this time that the § 2255 remedy is inadequate

or ineffective to address his complaints. The Court notes that this dismissal is without prejudice to petitioner's right, if any, to bring a challenge under United States v. Booker, 543 U.S. —, 125 S. Ct. 738 (2005), in the sentencing court.

Based on the file and records in this case, it is concluded that the findings of fact, conclusions of law, and proposed actions of the Magistrate are correct and should be approved. It is therefore

ORDERED that petitioner's exceptions filed herein be, and they are hereby, considered and overruled. It is further

ORDERED that petitioner be, and he is hereby, denied leave to proceed in forma pauperis. It is further

ADJUDGED that the petition herein for a writ of habeas corpus be, and it is hereby, dismissed without prejudice.

/s/ Richard E. Dorr
RICHARD E. DORR
United States District Judge

Date: September 22, 2005